IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 448

ANDREW KYRIACO, *et al.*, *Petitioners*,

v.

UNITED STATES OF AMERICA and CHARLES H. MORIYAMA, *Respondents*.

REPLY BRIEF FOR PETITIONERS

The brief for the United States in opposition in this case misstates both fact and law. This reply focuses on the Government's principal errors.

1. It Is Misleading for the Government To Claim That the Summonses Here Were Issued in a "Joint Investigation by Special Agents Moriyama and Regan and Revenue Agent Davis."

The District Court found that the summonses were issued in the course of an investigation undertaken by two Special Agents, Moriyama and Regan, that this was "not the 'continuing investigation' of tax liability referred to in *Boren* v. *Tucker*, 239 F.2d 767, 9th Cir. 1956," and that tax liability was being determined in this investigation "only as a necessity to a prosecutable criminal case." The Ninth Circuit accepted these find-

ings. The Government's veiled suggestion at page 3 of its brief that this case involves a "joint" civil and criminal investigation cannot be squared with these findings of the lower courts.[1]

2. It Is Not True That "the 'Criminal Purpose' Issue Will Be Reached in Donaldson Only If That Petitioner Convinces This Court That the Court of Appeals Erred in Denying Him Intervention . . . ."

The Fifth Circuit in the *Donaldson* case denied intervention because the petitioner there had not alleged sufficient facts to support his claim that section 7602 summonses were being used for an improper criminal purpose. *United States* v. *Mercurio*, 418 F.2d 1213, 1218 (1969). The Fifth Circuit denied intervention only after it had analyzed the "improper criminal purpose" issue in detail. Contrary to the Government's assertion at page 4 of its brief—that this Court must disagree with the Fifth Circuit's intervention decision in order to reach the "criminal purpose" issue—this Court *must* reach that issue unless it rejects the entire approach of the Fifth Circuit. Moreover, the Government's present position is strangely discordant with its statement at page 7 of its Memorandum in response

---

[1] The Government's position is inconsistent with the fact that the investigation in question has been re-numbered criminal investigation since June, 1968. When a case is so designated, it passes from the preliminary stages and becomes a full-scale criminal investigation. Moreover, since the petition for certiorari was filed, the Intelligence Division of the District Director's Office has recommended criminal prosecution of one of the corporate petitioners and one of the individual petitioners, and a hearing in the Regional Counsel's Office has been scheduled. In other words, it is amply confirmed that the present Internal Revenue Service investigation of petitioners is solely for the purpose of gathering evidence for a criminal prosecution.

to the petition for certiorari in *Donaldson*—that the improper criminal purpose issue "would appear to be embraced in a grant of certiorari to review the right of petitioner to intervene in this case."

3. It Is Not True That Petitioners Acknowledge That There Is No Conflict Among the Decisions of the Courts of Appeals Which Warrants Resolution by This Court.

The Court is confronted with far more than "different rationales"—the term employed by the Government at page 4 of its brief. As petitioners specifically note at pages 23-26 of their petition, this case would have been decided in their favor under the rules enunciated by the Third, Fifth, and Sixth Circuits. Those Courts of Appeals have formulated rules which are in direct conflict with the views of the Ninth Circuit, other courts, and the Government. A frequent and important ground for the Court's assertion of its certiorari jurisdiction is to resolve conflicts between the circuits with respect to rules of law. It is unnecessary for the Court to defer exercise of this jurisdiction until conflicting rules are applied to produce conflicting results. To do so in this case would only prolong the confusion and uncertainty which presently exist among the lower courts.

4. No Inference Adverse to Petitioners Can Be Drawn From This Court's Denial of Certiorari in the Giordano and Shlom Cases.

Both of these cases were very inadequate for consideration of the "improper criminal purpose" issue. The section 7602 summons in *United States* v. *Giordano* was issued by a Revenue Agent, not a Special Agent; both lower courts found that the investigation was for the purpose of determining civil tax liability; and the

Government's purpose was not attacked on Fourth Amendment grounds. 419 F.2d 564, 568 (8th Cir. 1969), *cert. denied*, 397 U.S. 1037 (1970). In *United States* v. *Shlom*, 420 F.2d 263 (2d Cir. 1969), *cert. denied*, 397 U.S. 1074 (1970), the investigation in question was conducted by a Special Agent and a Revenue Agent jointly, and the "constitutional issue" to which the Government has referred at page 5 of its brief was simply that "the investigation of the criminal case and civil discovery went forward on a common front . . . ." Petition for certiorari, p. 12, *Shlom* v. *United States*, No. 1319, Oct. Term, 1969. Neither of these cases presented both the constitutional and the statutory aspects of the "improper criminal purpose" issue, nor did the records in these cases provide a context as compelling for the resolution of that issue as the one in the instant case.

5. The Government Is Completely Wrong To Assert That the "Warrant Provisions" of the Fourth Amendment Do Not Apply in This Case.

The Government contends at page 5 of its brief that the "warrant provisions" of the Fourth Amendment "do not apply to administrative examinations of books and records." But here we do not have a mere "administrative" examination in the sense in which that term is used in the case authorities—*i.e.*, to describe an agency's civil investigations, in contradistinction to criminal investigations focused on a particular individual. *Camara* v. *Municipal Court*, 387 U.S. 523, 530, 533-34, 535, 537, 539 (1967); *See* v. *City of Seattle*, 387 U.S. 541, 543, 544-45 (1967). In this case, the District Court found that Special Agent Moriyama was conducting an "investigation where tax liability is to be determined only as a necessity to a prosecutable

criminal case."[2] This finding renders it unnecessary to analyze in detail the Government's interesting contention that the Fourth Amendment's "warrant provisions" do not apply in cases involving "administrative" investigations. It should be noted, however, that the warrant provisions do in fact apply to all administrative searches. *See* v. *City of Seattle*, 387 U.S. 541, 545 (1967); *Camara* v. *Municipal Court*, 387 U.S. 523, 538-39 (1967).

For the reasons stated in the petition for a writ of certiorari, a writ should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit in this case.

Respectfully submitted,

MORTIMER M. CAPLIN
H. DAVID ROSENBLOOM
LEON E. IRISH
1101 Seventeenth Street, N.W.
Washington, D. C. 20036

RALPH A. MUOIO
CAPLIN & DRYSDALE
Washington, D. C.

BAIRD, HOLLEY, BAIRD & GALEN
Los Angeles, California

Of Counsel

THOMAS A. BAIRD
JAMES MICHAEL WELCH
611 West Sixth Street
Los Angeles, California 90017

Attorneys for Petitioners

---

[2] The Government is wrong to assume, at page 3 of its brief, that the possibility of a 50% fraud penalty will justify the use of section 7602 summonses in a criminal investigation. The Fourth Amendment applies as fully to proceedings involving such quasi-criminal provisions as it does to criminal proceedings. *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693 (1965); *Boyd* v. *United States*, 116 U.S. 616, 633-34 (1886).